

## HOUSE BILL 711 "To Recognize Vested Water Rights on Federal Land"

On Sept. 12, 2006 we had the opportunity to ask questions about current Montana water law and the ongoing water adjudication. My husband and I had asked that current law be reviewed to see if the protection of our vested water rights that are on our grazing allotment are in agreement with the United States Court of Federal Claims in "Hage v. U.S." One part of the court's decision stated that Hage owned VESTED water rights on the federal land and that these vested water rights had been acquired and maintained by his predecessors-in-interest. These vested water rights were created by the Act of 1866 which reads in Section 9: "And be it further enacted, That whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The Court of Claims in Hage, and by definition in Black's law dictionary, stated the adjudication does not determine the ownership of the water right, but determines the quantity of water rights owned so the state can administer the water rights and prevent over-appropriating waters. The Court of Claims went so far as to say that if the ownership of vested water rights were dependent upon the completion of an adjudication, that would be a denial of due process since it is well-known that adjudications can and do take years to complete. The United States Supreme Court in 1878 Jennison v. Kirk said: "The object of the statute for protection of water rights recognized by local customs, laws and decisions of courts, is to give the sanction of the United States to possessory rights which had previously

rested solely upon local customs, laws and decisions and to prevent such rights from being lost on sale of the lands. This law merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated and confirmed a system already established, to which the people were attached. This same court in *Broder v Natoma Water Co.* 1879 :It is established doctrine of this court that rights of persons for purposes of mining and agriculture had, by its conduct recognized and encouraged and was bound to protect. The section of the act was rather a voluntary recognition of a pre-existing right of possession.

Mr. Wells Hutchins "Water Rights Laws in the 19 Western States" in volume 1 had this to say about the "Appropriative Right" the water right acquired under the Doctrine of prior appropriation: it is a species of property- it is a substantive and valuable property; a property right of high order. Some citations that come from property law regarding vested and vested right: 1) It is only a vested right which cannot be taken away except by due process of law 2) Vested has a well-understood meaning. It is used to define an estate either present or future, the title to which has become established in some person or persons and is no longer subject to some contingency 3) Vested and accrued right is superior to rights of subsequent entryman and carries with it right of way or easement for impounding water. This vested right is absolute, complete and unconditional in itself, fixed, unalterable and irrevocable. This property interest is so substantial in character that its de-destruction or deprivation cannot be justified by the objectives in view.

The Taylor Grazing Act recognizes prior rights and vested water rights: section

315: "Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which been heretofore or may be hereafter initiated under existing law validly affecting the public lands, nor as limiting or restricting the power or authority of any state as to matters within its jurisdiction." Section 315b "vested water rights: Preference shall be given in the issuance of grazing permits to those who are landowners engaged in the livestock business, owners of water or water rights. Provided further, That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law." TGA also says that fences, wells, reservoirs and other improvements necessary to the care and management of permitted livestock may be constructed. No permit shall be issued which shall entitle the permittee to the use of the improvements owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements." The Federal Land Policy Management Act section 1769 2) Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted. Section 1752g states that if the government takes an allotment to devote it to another purpose, then the allotment owner shall be compensated for the value of the improvements. The court in the Hage decision said that Hage owned vested water rights, owned the "fee" (inheritable right-of-use) of the land where those waters arise, forage, rights-of-way and improvements. In 1978 Montana's attorney general signed on with New Mexico in U.S. v. New Mexico. The United States Supreme Court held that under the prior appropriation

doctrine, federal agencies could not have stockwater rights on federal land and that stockwater rights on federal land belong to the livestock owner and appropriator. Montana's department of natural resources have rules for stockwater claims by federal agencies and Montana has not developed a law that clarifies that per U.S. v. New Mexico and a recent ruling by the Idaho Supreme Court that federal agencies do not have and cannot claim stockwater rights. Does this leave an opening to allow federal agencies to acquire water rights by adverse possession? In volume 3 Wells Hutchins wrote the following about adverse possession under Montana water law: "an appropriator may be estopped from asserting water right against parties he has misled, such as misleading statements or acts or concealment of facts by silence-with the result that the other party was induced to change his position for the worse."

It was brought out during the environmental Quality Council meeting that the Exempt right is outside of the water court and there is no court to go to. Wells Hutchins raised the issue in his work about the value of an adjudication where an unknown number of unquantified rights impair the value of an adjudication. He also voiced a concern that rights that were unrecorded would be denied legal protection later. This raises a concern on our part that by "settling" for the "exempt" right we will have impaired or forfeited the protections of the vested water right. It was interesting to find earlier territorial documentation that recognized vested rights and made allowance for vested rights to be brought before the court.

.Legislative history mca 75-7-104 and 87-5-50:

VESTED WATER RIGHTS PRESERVED. This part shall not impair, diminish, divest or control any existing or vested water rights under the laws of the state of Montana or the United States. The Montana Water court cases 40-E and 41 G give recognition to vested rights and state that the water right vests with the appropriator. Language that is included on patents issued by the United States government says :” subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts.”

Other prior appropriation doctrine states that recognize vested water rights are Arizona, California, Colorado, Idaho, Nevada, North Dakota, New Mexico, Oregon, South Dakota, Washington and Wyoming. Washington and Arizona revised water law in the 70's that resulted in litigation. Both instances resulted in courts and an attorney general letter saying that a law that retroactively impairs or destroys a vested right is a denial of due process and is unconstitutional. The United States Supreme Court in Marbury v. Madison stated that an act of a court or a legislature that was repugnant to a constitution was null and void.

The Montana Constitution guarantees everyone a court to go to and a speedy remedy in Section 16, THE ADMINISTRATION OF JUSTICE and section 17 DUE PROCESS OF LAW. No person shall be deprived of life, liberty, or property without due process of law.

Prior to Sept. 12, 2006, we had tried to file “exempt rights” for our stockwater on our grazing allotment. We filed 75 forms and paid the Montana DNRC \$2125 in filing fees. We received preliminary decrees for exempt rights and they had remarks that there

is a problem with this because it is on public land. According to Black's law dictionary public land is unappropriated land belonging to the federal or a state government. Bouvier's law dictionary defines public land as follows: The United States is the sole owner of the soil and has entire and complete jurisdiction over it. Such lands of the United States as are open to sale or other disposition under general laws. Nor does the term include lands to which any claims or rights of others have attached. cites United supreme Court 1894 Bardon v Northern Pacific Railway 145US 538, 12 SC 856, 36 L.Ed. 806; cited 133 times and never overturned in whole or in part. Last cited in Watt v Western Nuclear. The vested water rights that we are recording to ensure their future protection are within exterior boundaries of our lawfully adjudicated allotment. After hearing that the exempt right would not be considered in the adjudication and would therefore not be able to be brought into the water court, we were concerned that our filing for exempt rights would appear that we knowingly and willingly waived our vested water right and forfeited it. In order to correct that error and not alienate ourselves from our valuable property right in the form of the vested water right- since there is no recognition of vested water right in the Montana water law and no provision to record that- only a recognition and method to record the exempt- we filed an affidavit to record our ownership of vested water rights and put a public notice in our local paper three times, per the Montana Constitution, Article IX, section 3.

It appears to us that it is a valid question to ask if the state of Montana recognizes the vested water right? If so, it needs to be recognized in the water law and with that recognition is a method of making it public record. If the state does not recognize it, then the question we would have to ask is has there been a destruction of that right and would

that be a takings?

We would like to ask that the current law be amended to recognize and make provision for recording these water rights. We feel it is very important that every owner be given an opportunity to protect their vested water rights without obstruction and misrepresentation by third party federal agencies. It has not been uncommon for agency employees to misinform, intimidate or cunningly coerce in order to preclude and prevent rightful owners from taking action to protect their water rights. It is a legal axiom that for every wrong, there has to be a remedy. We are hopeful that this legislature will provide the needed remedy.

*Maxine Korman*

MAXINE KORMAN  
PO BOX 162  
HINSDALE, MT. 59241

406-648-5536

A conclusion by way of reasonable inference from the evidence is a "**finding of fact**" within statutory rule **making trial justice's findings conclusive**. Gen.Laws 1938, c. 300, art. 3, § 6. *Recchia v. Walsh-Kaiser Co.*, 43 A. 2d 313, 314, 71 R.I. 208.

## VESTED — VESTED RIGHT

It is **only a vested right** which cannot be taken away except by due process of law. *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); *Crump v. Guyer*, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916)

The word "property" as used in the Due Process Clause refers to vested rights, and there is no reference to mere concessions or privileges which may be bestowed or withheld at will. *Senior Citizens League v. Department of Social Sec. Of Wash.*, 38 Wash. 2d 142, 228 P.2d 478 (1951).

A mere subjective "**expectancy**" is **not an interest in property** protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570, 1 I.I.R. Cas. (BNA) 33 (1972).

To have a property interest in a benefit protected by procedural due process, **a person must have more than an abstract need or desire** for it, and he or she must have more than a unilateral expectation of it; in short, **he or she must have a legitimate claim of entitlement to it.** *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, 1 I.E.R. Cas. (BNA) 23 (1972).

Accordingly, the revocation of such qualified rights does not amount to deprivation of property without due process of law. *State v. Durein*, 70 Kan. 1, 78 P. 152 (1904).

(In recognition of the Commerce Clause of the US Constitution, it has often been declared that a state cannot make the payment of a license [permit] tax or the securing of a license [permit] a condition to carrying on interstate commerce and cannot tax the privilege of carrying on interstate business.)

The substantial **value of property lies in its use**; if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).

The Constitutional right to acquire, possess and protect property is not limited to any particular **amount of property**. *Hamilton v. Williams*, 145 Fla. 697, 200 So. 80 (1941).

Under the constitutional provision that private property shall not be taken or damaged for public use without just compensation, **owner has absolute right to damages whenever his property is taken** or damaged for public use, and it is **immaterial** whether the **damages are ascertained before or after the injury, since such right is a "vested property right"** *People ex rel. O'Meara v. Smith*.

### Vested Property Right:

**Allotment of lands to individual Indians in pursuance of a treaty or Act of Congress, by the terms of which it is agreed between the US Government and the Tribe, assented to by the state, that the lands thus allotted in severalty shall remain tax free for a stipulated period, creates a "vested**



# The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at **Great Falls, Montana,** has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of **John August Petterson** has been established and duly consummated, in conformity to law, for the **Lots two, three and four and the east half of the southwest quarter of Section thirty and the Lot one and the northeast quarter of the northwest quarter of Section thirty-one in Township twenty-seven north of Range thirty-four east of the Principal Meridian, Montana,** containing two hundred sixty-eight acres and sixty-nine hundredths of an acre,

according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, **Calvin Coolidge,**

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the **SEVENTEENTH**

(SEAL.)

day of **APRIL** In the year of our Lord one thousand

nine hundred and **TWENTY-EIGHT** and of the Independence of the

United States the one hundred and **FIFTY-SECOND**

By the President:

By

Bureau of Land Management  
Montana State Office, Billings MT  
I hereby certify that this reproduction is a  
copy of the record on file in this office.

Authorized Signature:

Date: **July 27, 2005**

*Calvin Coolidge*  
*W. B. C. Engle* Secretary  
*M. P. LeRoy*  
Recorder of the General Land Office

**property right** in the individual allottee which neither national nor state government may impair or invade. *Board of County Com'rs of Creek County, Okl. v Seber*. C.C.A.Okl., 130 F.2d 663, 668.

### Vested:

Under the decisions of this state, the word **"vested"** has a well-understood meaning. It is used to **define an estate**, either present or future, the **title** to which has become **established in some person or persons** and **is no longer subject to any contingency**. *Snortum v. Snortum*, 193 N.W. 304, 305, 155 Minn. 230.

### Vested and Accrued Right:

One complying with local laws for appropriation of water and constructing works for diversion thereof on vacant public lands of US **acquires "vested and accrued right"** within Rev.St.U.S. §§ 2339, 2340, 30 U.S.C.A. §§ 51, 52, which is superior to rights of subsequent entry-man and **carries with it right of way or easement for impounding water**. *Gila Water Co. v. Green*, 232 P. 1016, 1017, 27 Ariz. 318.

### Vested Right:

A **"vested right"** has been defined briefly as an immediate, fixed right of possession or future enjoyment. *Young v. Jones*, 54 N.E. 235, 236, 180 Ill. 216

A **"vested right"** is property which the law protects. *Hoelt v. Supreme Lodge Knights of Honor*, 45 P. 185, 186, 113 Cal. 91, 33 L.R.A. 174.

A **"vested right"** is absolute, complete and unconditional in itself. *State ex rel. Wayne County v. Hackmann*, 199 S.W. 990, 991, 272 Mo. 600.

A **"vested right"** is a right which **is fixed, unalterable, or irrevocable**. *Miller v. Johnstown Traction Co.*, 74 A.2d 508, 511, 167 Pa. Super. 22.

A **"vested right"** is power to do certain actions or possess certain things lawfully and is **substantially a property right** which may be created either by common law, statute or contract. *Scamman v. Scamman*, *Ohio Com.Pl.*, 90 N.E.2d 617, 619.

A **"vested right"** is one which **is absolute, complete and unconditional** to exercise of which no obstacle exists and which is **immediate and perfect in itself and not dependent upon a contingency**. *Hutton v. Autoridad Sobre Hogares De La Capital, D.C. Puerto Rico*, 78 F. Supp. 988, 994, 999.

A **"vested right"** **is a property interest so substantial in character that its destruction or deprivation cannot be justified by the objectives in view**. *Vernon Manor Co-op. Apartments Section I, Inc. v. Salatino*, 178 N.Y. S.2d 895, 901, 15 Misc. 2d 491.

DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION  
GLASGOW WATER RESOURCES REGIONAL OFFICE



JUDY MARTZ  
GOVERNOR

222 6th STREET SOUTH  
BOX 1269

STATE OF MONTANA

(406) 228-2561  
FAX (406) 228-8706

February 6, 2003

GLASGOW, MONTANA 59230-1269

Thomas J. Fisher  
PO Box 278  
Hinsdale MT 59241

RE: Notice of Water Right Applications

Dear Mr. Fisher:

We received the enclosed Notice of Water Right applications on February 5, 2003. These water right applications are located on land that is currently owned by the Bureau of Land Management.

When a water right is appurtenant to public land owned by the federal government, the ownership of the water right should be in the name of the government entity. Therefore, these water right applications cannot be processed to record the water rights in your name. Any water rights recorded for this land should reflect the ownership as Bureau of Land Management.

If you have any questions, please do not hesitate to contact me.

Sincerely,

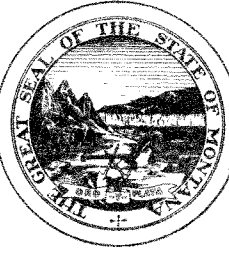
*Pam Weinmeister*

Pam Weinmeister  
Compliance Technician  
Glasgow Water Resources Regional Office

PW:pw  
Enc.

*WRC  
Glasgow County - Jennings  
Husker's Bad*

DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION  
GLASGOW WATER RESOURCES REGIONAL OFFICE



JUDY MARTZ  
GOVERNOR

222 6th STREET SOUTH  
BOX 1269

STATE OF MONTANA

(406) 228-2561  
FAX (406) 228-8706

February 6, 2003

GLASGOW, MONTANA 59230-1269

ATTN: Ronnie D. Korman  
Korman Ranch  
PO Box 162  
Hinsdale MT 59241

RE: Notice of Water Right Applications

Dear Mr. Korman:

We received the enclosed Notice of Water Right applications on January 31, 2003. These water right applications are located on land that is currently owned by the Bureau of Land Management.

When a water right is appurtenant to public land owned by the federal government, the ownership of the water right should be in the name of the government entity. Therefore, these water right applications cannot be processed to record the water rights in your name. Any water rights recorded for this land should reflect the ownership as Bureau of Land Management.

If you have any questions, please do not hesitate to contact me.

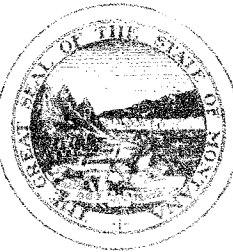
Sincerely,

A handwritten signature in cursive script that reads "Pam Weinmeister".

Pam Weinmeister  
Compliance Technician  
Glasgow Water Resources Regional Office

PW:pw  
Enc.

DEPARTMENT OF NATURAL  
RESOURCES AND CONSERVATION  
GLASGOW WATER RESOURCES REGIONAL OFFICE



JUDY MARTZ  
GOVERNOR

222 6th STREET SOUTH  
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STATE OF MONTANA

(406) 228-2561  
FAX (406) 228-8706

GLASGOW, MONTANA 59230-1269

DIVILC

ALSO SENT COPY TO  
GLASGOW BLM

March 12, 2003

Korman Ranch  
Ronnie D. Korman  
PO Box 162  
Hinsdale, MT 59241

Subject: Notice of Water Right Filings (Exempt from the Adjudication Filing Requirements)

Dear Mr. Korman,

The Department of Natural Resources & Conservation (Department) has received 25 Notice of Water Rights (Notice) on various sources of water in Valley County. The Department will place in its records the exempt rights you claim for those rights that can be considered exempt. By definition, exempt means water rights existing prior to July 1, 1973 for livestock and individual use, based upon instream flow or ground water sources. Instream flow means direct use in a stream without using a ditch, pipe, dam, bucket, pump or other diversion method.

Several of the filed Notices list the source of water as a pit, dam, or pit/dam. These rights cannot be considered exempt and will be terminated. Your filing fee will be refunded for those rights.

The Glasgow Regional Office will review the other Notices and will contact you if there are questions that need to be answered. For example, one Notice shows that 350 cows are drinking from the source for 244 days, which would mean the animals could use 3.9 acre-feet of water, however you only entered 2 acre-feet.

Once we have the required information, we will issue an Acknowledgement of Exempt Right. **The Acknowledgement does not grant you a water right.** It merely contains information about water use that you provided to the Department. Further, it is issued with the following statements, "THIS WATER RIGHT IS IDENTIFIED AS EXEMPT FROM THE ADJUDICATION PROCESS BY THE MONTANA WATER COURT PURSUANT TO 85-2-222, MCA. (EXEMPT RIGHTS ARE BASED ON INFORMATION AND EVIDENCE PRESENTED BY THE OWNER. THE BURDEN OF PROOF OF THE RIGHT REMAINS WITH THE OWNER.) THIS ACKNOWLEDGEMENT IS NOT INTENDED, NOR IS IT THE

*Korman*

3/12/03

INTENT TO BE CONSTRUED TO CONSTITUTE RECOGNITION OR ADMISSION BY THE STATE OF SUCH WATER RIGHTS, NOR AS EVIDENCE OF THE USE OR PRIORITY OF USE IN ANY ADJUDICATION PROCEEDINGS UNDER THE LAWS OF THE STATE OF MONTANA." What that means is that sometime in the future you are still responsible to prove in a court of competent jurisdiction the water right claimed in the Notice.

The Department understands that there are ownership questions surrounding these Notices, but the Department will not decide that issue. Nor will the Department take sides in the resolution of the issue.

If you have any questions, please contact me.

Sincerely,

*Pam Weinmeister for*

Kimberly A. Overcast  
New Appropriations Program Manager  
Phone No 406-444-6614  
Fax No. 406-444-0533  
Email - [kovercast@state.mt.us](mailto:kovercast@state.mt.us)

c: BLM – Glasgow Office Address  
Senator Conrad Burns  
Bud Clinch, DNRC, Department Director  
Jack Stults, DNRC, Water Resources Division Administrator  
Curt Martin, DNRC, Water Rights Bureau  
Bob Larson, DNRC, Water Resources Regional Manager

## LANDLORD AND TENANT

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## LANDMARKS

the right to remove; Adams v. Goddard, 48 Me. 212; or a mortgage; Allen v. Brown, 5 Laus. (N. Y.) 290; or a mechanic's lien; Gaskill v. Trainor, 3 Cal. 334; or the right to remove fixtures; Morrison v. Sohn, 90 Mo. App. 76; on the leased premises, the lessor commits trespass if he enters upon the subtenant after a surrender; Krider v. Ramsay, 79 N. C. 354; Brown v. Butler, *supra*, where it was also held that the right of the subtenant, was not affected by a covenant against subletting in the original lease; but see *Trueman v. Lippincott*, 39 Mo. App. 478.

Where the tenant, by consent of his landlord, continues in possession after the expiration of his term, in the absence of a new agreement, the law will imply a tacit reversion of the former one; Schilling v. Klein, 41 Mo. App. 208; Caranough v. Clinch, 88 Ga. 610, 35 S. E. 673, [1893] 1 Q. B. 736.

After the tenancy has ended, the right of possession reverts to the landlord, who may re-enter upon the premises if he can do so without violence. But if the tenant holds over and the landlord takes possession forcibly, so as to endanger a branch of the peace, he has the risk of being punished criminally for a forcible entry (see *Foster v. Exray and Dralner*) as well as of suffering the consequences of an action of trespass; *Law v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272; *Stearns v. Sampson*, 59 Me. 568, 8 Mo. Rep. 421; 4 Am. Law Rev. 429; 1 M. & C. 644; *Overdeer v. Lewis*, 1 W. & S. (Pa.) 90, 37 Am. Dec. 440. The landlord should, therefore, in all such cases, call in the law to his assistance, and receive possession at the hands of the sheriff.

The tenant, on his part, is bound quietly to yield up the possession of the entire premises; *Poppers v. Meagher*, 145 Ill. 192, 35 N. E. 805. And for refusal to perform this duty he will be liable for rent; *Schuyler v. Smith*, 51 N. Y. 309, 10 Am. Rep. 609; *Clapp v. Noble*, 84 Ill. 62; *Bonney v. Foss*, 62 Me. 248; E. R. & E. 326.

If the tenant, after surrendering possession, resumed it under any agreement with his landlord or his agent, though made by the latter without authority, he is not liable for holding over; *Frost v. Iron Co.*, 1 App. Div. 449, 37 N. Y. Supp. 374; and where a tenant vacated a building and delivered up the key, leaving a press on the premises, which was used by his employee, who had entered the building some days after without his knowledge, he did not hold over; *Excelsior Steam Power Co. v. Frank*, 5 App. Div. 124, 39 N. Y. Supp. 41.

## LANDLORD AND TENANT

## LANDMARKS

N. Y. Supp. 754; and so is the hiring of the outer wall for such purpose; *Oakford v. Nirdlinger*, 136 Pa. 162, 46 Atl. 374; but an agreement by a lessee to permit a third person, for an annual sum, to hang a sign on the outer wall, was held a license; *Lewell v. Strahan*, 145 Mass. 1, 12, 13, 12 N. E. 401, 1 Am. St. Rep. 422; and it was not a breach of a covenant not to underlet, with or without leave from month to month, cannot lease the wall of the building for advertising purposes; *Louisville Canning System v. Parks*, 126 Ky. 532, 104 S. W. 331, 13 L. R. (N. S.) 587; or the sign; *Supp. 1036*; *v. Parley*, 28 Misc. 134, 88 N. Y. Supp. 1036; though he has a right to sublet other portions of the building; *id.* Where there is a lease of the wall a building to an advertising company, user because of failure liable for holding over at the expiration of the specified period of occupancy; *Goldman v. Advertising Co.*, 20 Misc. 133, 89 N. Y. Supp. 275. The advertiser is not liable for injuries caused by the sign board's blowing down; *Rebels v. Van Reuren*, 135 N. Y. 120, 124, 36 N. E. 763, 42 L. R. A. 129. See *Ed. 769*; *Heydenfeldt v. Min. Co.*, 10 Nev. Underhill, *Land & Ten.* 288, § 204.

The ordinary common-law remedy by which a landlord proceeds to recover the possession of his premises is by an action of ejectment; and in these cases it is a general rule that the tenant is never permitted, for reasons of sound public policy, to controvert the landlord's title, or to set up against him any title acquired by himself during his tenancy which is hostile in its character to that which he acknowledged in accepting the demise. 'The authorities for this rule and the exceptions to it are fully stated *supra*.'

But the slow and measured progress of the action of ejectment in most cases affords a very inadequate remedy to the landlord; and in order, therefore, to obviate the evils arising from its delays, the statutes of the different states provide a summary proceeding, by which a landlord may be speedily reinstated, upon short notice, in cases where a tenant abandons the premises before the end of the term without surrendering the lease, leaving rent in arrear, or continues to hold over after the expiration of his term, or has become unable or unwilling to pay rent for the use of the premises; *Stratton v. Lord*, 22 Wend. (N. Y.) 611; *Tracy L. & T. Co. v. U. S.*, 92 U. S. 733, 23 L. Ed. 634; while the claim of the government extends to the con-

quest, cession by states or other nations, and purchase, and is discussed of under and by authority of the national government, when the Indian title thereto (which is one of possession merely) has been extinguished by treaty stipulations or otherwise.

The fee in unsoil lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be divested, except by purchase or war; *Godfrey v. Beaulieu*, 2 McLean, 412, Fed. Cas. No. 5,461.

They have the unquestionable right to the lands which they occupy until extinguished by a voluntary cession to the government; *Leavenworth, L. & G. R. Co. v. U. S.*, 92 U. S. 733, 23 L. Ed. 634; while the claim of the government extends to the con-

RON.

## LANDLORD'S WARRANT. A warrant of